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NO. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, *et al.*,
Petitioners

v.

EXXON CORPORATION, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the district court properly enjoined Petitioners from relitigating the same cause of action in state court which had previously been dismissed by the same federal district court under the maritime doctrine of *forum non conveniens*.

2. Whether a state court hearing a maritime personal injury or death claim pursuant to the "savings to suitors" clause of 28 U.S.C. § 1333 must apply federal maritime *forum non conveniens* rules when the claim has substantial contacts with a foreign forum.

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BRIEF FOR RESPONDENTS

To the Honorable Justices of the Supreme Court of the United States:

COME NOW Exxon Corporation and Esso Tankers, Inc.,* Respondents (sometimes referred to jointly as "Exxon"), and file this their Brief and would respectfully show to the Court as follows:

* Exxon Corporation has numerous subsidiaries and affiliates. Esso Tankers, Inc. is a wholly, but indirectly, owned subsidiary of Exxon Corporation.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit under review is reported under the style of *Exxon Corporation v. Chick Kam Choo,* 817 F.2d 307 (5th Cir. 1987).

JURISDICTION

The statement of jurisdiction set out in Petitioner's Brief is correct.

STATUTE INVOLVED

The statute involved in this case is the Anti-Injunction Act, 28 U.S.C. § 2283, which provides as follows:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

The Petitioners Chick Kam Choo and her attorneys Benton Musslewhite and Joseph C. Blanks seek review of a decision of the United States Court of Appeals for the Fifth Circuit rendered on May 21, 1987, affirming the judgment of the United States District Court for the Southern District of Texas permanently enjoining the Petitioners pursuant to Sections 1651(a) and 2283 of Title 28, U.S.C., from prosecuting or commencing any actions against the Respondents in the courts of the State of Texas or any other state of the United States arising out of or related to the death of Leong Chong in Singapore in 1977.

The central issue presented for review is whether the dismissal under the doctrine of *forum non conveniens* of a maritime action brought by a foreign claimant for the death of a foreign maritime worker occurring outside of the United States precludes litigation of the same claim in a state court and thus supports an injunction prohibiting such litigation under the relitigation exception of the Anti-Injunction Act, 28 U.S.C. § 2283.

A. Course of Proceedings and Disposition in the Court Below.

On March 14, 1978, Chick Kam Choo, a resident of the Republic of Singapore, filed a civil action in the United States District Court for the Southern District of Texas seeking to recover in behalf of herself and her children for the wrongful death of her husband Leong Chong, a Singapore shipyard worker.

On July 31, 1980, an Order of Dismissal and a Final Judgment were entered, holding, *inter alia,* that Singapore law applied, that Leong Chong was not a Jones Act seaman as a matter of law, and that the action be dismissed under the maritime doctrine of *forum non conveniens* for further proceedings in the Republic of Singapore.

Chick Kam Choo did not file a timely appeal from the court's Final Judgment, but filed instead a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to set aside the Final Judgment. This motion was denied on December 8, 1981, and an appeal was taken. The district court's denial of relief under Rule 60(b) was affirmed in *Chick Kam Choo v. Exxon Corp.,* 699 F.2d 693 (5th Cir. 1983). After Petitions for Rehearing and Rehearing En Banc were denied by the Fifth Circuit,

Chick Kam Choo filed a Petition for Writ of Certiorari with this Court, which was denied on October 3, 1983, 464 U.S. 826 (1983).

On January 6, 1984, Chick Kam Choo filed an Original Petition in the 270th Judicial District Court of Harris County, Texas, which was substantially identical to the Complaint filed in 1978 in the Southern District of Texas. The cause filed in state district court was removed to the Southern District of Texas, Houston Division, on grounds of diversity of citizenship and alienage jurisdiction. The district court denied Chick Kam Choo's motion to remand the case, and granted Exxon's Motion to Dismiss. Notice of Appeal was filed and on July 8, 1985, the Fifth Circuit Court of Appeals reversed the district court, holding that the necessary subject matter jurisdiction was lacking and vacated the district court's judgment with instructions that the case be remanded to state court. *Chick Kam Choo v. Exxon*, 764 F.2d 1148 (5th Cir. 1985). The Order remanding the case was entered by the district court on August 16, 1985.

On February 11, 1986, the instant action was commenced. Exxon filed a Motion for Summary Judgment and Application for Permanent Injunctive Relief, which was granted by the district court on May 15, 1986. The judgment of the district court enjoining the Petitioners from prosecuting or commencing any action against the Respondents in the courts of the State of Texas or any other state of the United States arising out of or related to the death of Leong Chong in Singapore in 1977 was affirmed by the Fifth Circuit on May 21, 1987 and rehearing and rehearing *en banc* were denied on June 24, 1987.

B. Facts of the Case.

The action decided by the Southern District of Texas in 1980 and the cause now pending in the 270th Judicial District Court of Harris County, Texas, are essentially identical claims seeking to recover for the death of Leong Chong, a resident of Singapore, who was killed while working onboard the M/V ESSO WILHELMSHAVEN while it was undergoing repairs at a shipyard in Singapore during March 1977. The M/V ESSO WILHELMSHAVEN was at all relevant times a Liberian flag vessel owned by Esso Tankers, Inc. and operated by Exxon International, an unincorporated division of Exxon Corporation. Exxon and Esso Tankers were the defendants in the original federal action and the defendants in the cause pending in Texas court. Thus, the parties in the two actions are identical.

In the Original Complaint filed in the Southern District of Texas, the Petitioner, acting both individually and in a representative capacity, sought to recover for the death of her husband Leong Chong under the Jones Act, the general maritime law of the United States, the Longshore and Harbor Workers' Compensation Act, the Death on the High Seas Act, and the wrongful death statutes of the State of Texas. Exxon filed a Motion for Partial Summary Judgment and to dismiss under the maritime doctrine of *forum non conveniens*. The district court explicitly held that American law did not apply and granted Exxon's Motion for Partial Summary Judgment as to the claims presented under the Jones Act, Death on the High Seas Act, the Longshore and Harbor Workers' Compensation Act, and the general maritime law of the United States. The Court granted a conditional dismissal of the foreign

law claims on the grounds of *forum non conveniens,* provided that Exxon consented to the jurisdiction of the appropriate Singapore court. No attempt to commence an action in the courts of Singapore has been made by Petitioner or her attorneys.

C. Decision Below.

The judgment of the district court was affirmed by a split panel of the Fifth Circuit. Circuit Judge Gee wrote the opinion of the court in which he upheld the injunction of the state court proceedings on the basis of *res judicata,* holding:

> Under the federal uniformity doctrine state courts *must* apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts have admiralty jurisdiction.

817 F.2d at 324. Chief Judge Clark concurred in the result, without reaching issues of sovereignty, preemption, comity or *res judicata,* but also agreed with Judge Gee's analysis "that the maritime nature of the order entered in the present controversy would preempt the inconsistent exercise of state court jurisdiction." 817 F.2d at 325. Circuit Judge Reavley dissented on the gound that it was up to "the Texas court to decide its own forum convenience and to identify the issues subsidiary to that determination." 817 F.2d at 325.

Judge Gee based his opinion on factors of *res judicata.* As he observed early in the opinion "the only real issue in this case is whether the district court's dismissal of the first action bound all subsequent proceedings in Houston

courts." 817 F.2d at 309. This issue was further refined into the question of "whether the *forum non conveniens* issue is the same in Houston federal and state trial courts." 817 F.2d at 312. Judge Gee concluded that the maritime *forum non conveniens* doctrine *preempted* state law under the uniformity doctrine. On this basis he further concluded that the *forum non conveniens* issue *was* the same in federal court and state court, so that the prior federal dismissal constituted a direct estoppel precluding any reconsideration of the issue by the state court.

SUMMARY OF ARGUMENT

1. Under the All Writs Act, 28 U.S.C. § 1651, and the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, a federal court is empowered to enjoin the reconsideration by a state court of an issue finally decided by the federal court. This power is to be exercised to prevent unnecessary friction between the state and federal courts and to prevent interference with a prior federal judgment. In order to justify the issuance of an injunction, the prior federal judgment must preclude relitigation of the issues decided. Under federal *res judicata* rules, a federal court is entitled to decide the scope and preclusive effect of its own judgment. Under Fifth Circuit precedent, a dismissal of a maritime personal injury or death claim under the doctrine of *forum non conveniens* for adjudication in a foreign forum, predicated, at least in part, on a determination that foreign law controls, is similar to a dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure or a summary judgment under Rule

56. Such a dismissal precludes further litigation in the United States. Since a state court is required under the uniformity doctrine to apply the same standard as the federal court in such cases, a prior federal dismissal of a maritime tort claim *forum non conveniens* is *res judicata* as to the state court and justifies the issuance by the federal court of an injunction to prevent the subsequent prosecution of the same claim in the state court.

2. A state court entertaining a maritime personal injury or death claim pursuant to its concurrent maritime jurisdiction under the "saving to suitors" clause, 28 U.S.C. § 1333, is bound to apply the federal maritime rule of *forum non conveniens*. The rule constitutes a substantive rule of decision of maritime law and, as such, a state court exercising its concurrent maritime jurisdiction under the savings clause is bound to apply the rule pursuant to the uniformity doctrine.

A. The maritime *forum non conveniens* doctrine combines the policy considerations underlying the maritime choice of law rules articulated in *Lauritzen v. Larson*, 345 U.S. 517 (1953); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) and *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970) and the federal *forum non conveniens* rule of *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft Corp. v. Reyno*, 454 U.S. 235 (1981). Its focus is not so much on factors of private convenience as the public interest concerns that arise out of the need to accommodate and balance competing national interests in an area where international law and domestic

law intersect. The maritime *forum non conveniens* rule constitutes a framework in which our maritime courts can decide whether the United States is the appropriate forum in cases with predominately foreign contacts. In this regard, the rule is fundamentally different from the *forum non conveniens* rule directed to the determination of the most appropriate or convenient American forum in cases indigenous to this country. The maritime rule is directed to the resolution of the problem of whether it would be appropriate to adjudicate the case in *any* United States court, whether state or federal. Because of the question it resolves, the maritime *forum non conveniens* rule must be binding on all American courts. If a second American court is permitted to entertain a case after the first court has decided, pursuant to the maritime rule that adjudication in the United States is not appropriate, the maritime rule becomes a nullity. If the maritime rule is to have any efficacy, it must be treated as a substantive rule and not merely a matter of procedure.

B. In exercising their concurrent maritime jurisdiction, state courts are required to follow federal maritime law under the uniformity doctrine. *See generally Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). In deciding whether a state court is bound to follow the maritime *forum non conveniens* rule, the court below focused on factors indicating that federal maritime law should preempt state law when a uniform rule will facilitate maritime commerce and when maritime law impinges on transnational or international relations. In the very simplest of terms, the decision below is predi-

cated on the proposition that federal law must control the international role of all American courts. Maritime law is in a very real sense international law. It must be concerned with the accommodation of competing interests on the international level. At the same time, it must be concerned with the accommodation of state and federal interests under our federal system. On the international level, it is necessary that our courts speak with a unified voice. Because of this, state courts must accommodate themselves to the need for uniformity and be obliged to follow the maritime *forum non conveniens* rule. Otherwise, the states would be in a position to frustrate and nullify the international accommodation represented by the maritime rule.

3. Once it is concluded that a state court is required to apply the maritime *forum non conveniens* doctrine in an appropriate case, it follows that a prior dismissal of the same claim by a federal court under the doctrine would preclude a reconsideration of the issue by a state court under traditional concepts of *res judicata*. *See Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3rd Cir. 1977). In such an instance, the federal court would be entitled to enjoin the state court from reconsidering the prior federal dismissal pursuant to the relitigation exception of the Anti-Injunction Act. The action of the district court in issuing such an injunction in this case was not only correct, but necessary, and must be affirmed.

ARGUMENT

I. A Federal Court is empowered to enjoin a state court proceeding to prevent the relitigation of an issue finally decided by the federal forum.

The All Writs Act, 28 U.S.C. § 1651, authorizes "The Supreme Court and all courts established by Act of Congress [to] issue all writs necessary and appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." This broad grant of authority to effectuate the jurisdiction of our federal courts is circumscribed by the general prohibition of the Anti-Injunction Act, 28 U.S.C. § 2283, which provides that "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The phrase "to protect or effectuate its judgments" was added by Congress in 1948 to the Anti-Injunction Act in response to this Court's decision in *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941), to make clear that the courts of the United States have the power to protect their judgments from the threat of re-examination in a state proceeding. This power constitutes the "relitigation exception." *See* Revision Notes to 28 U.S.C. § 2283.

While the Anti-Injunction Act circumscribes federal interference with state courts, the relitigation exception allows a federal court to prevent the relitigation of an issue or claim finally decided by a prior federal judgment involving the same parties in a state court proceeding. *Mitchum v. Foster*, 407 U.S. 225 (1972); *Seaboard Coast*

Line Railroad Co. v. Union Camp Corp., 613 F.2d 604 (5th Cir.), *cert. denied*, 449 U.S. 835 (1980) (quoting *Woods Exploration and Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1312 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972)); *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977); *International Association of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125 (5th Cir. 1975). Such an injunction is designed to prevent unnecessary friction between the state and federal courts and to prevent any interference "with the federal court's judgment." *Teas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263, 1266 (5th Cir. 1969). The injunction also "assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review." *International Association of Machinists & Aerospace Workers v. Nix, supra*, 512 F.2d at 130.[1] The boundaries of *res judicata* and collateral estoppel may be protected by an injunction when necessary to prevent harassment of successful litigants and a consistent theme of federal law mandates the enjoining of state court proceedings regarding issues which have been fully and finally

1. A classic example of this problem is the case of *Kassapas v. Arkon Shipping Agency*, involving the death of a Greek national which occurred in the Soviet Union while serving aboard a Liberian vessel owned by a Greek corporation. The claim was dismissed pursuant to the maritime doctrine of *forum non conveniens* by the federal district court for the Southern District of New York, 578 F.Supp. 400 (S.D.N.Y.), *aff'd mem.*, 738 F.2d 418 (2d Cir. 1984). The identical claim was subsequently filed in a Louisiana state court, which refused to consider itself bound by the prior federal dismissal or by the maritime rule of *forum non conveniens* and tried the matter to conclusion. 485 So.2d 565 (La. App.), *writ denied*, 488 So.2d 203 (La.), *cert. denied*, _____U.S._____, 107 S. Ct. 422 (1986).

adjudicated. *Hardwick v. Doolittle*, 558 F.2d 292, 295 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978).[2] The prior judgment must be such as to preclude the relitigation of the issue under federal *res judicata* rules. *Mitchum v. Foster, supra*. The federal court is empowered to determine the scope and preclusive effect of its prior judgment according to federal law in exercising its discretion to enjoin the re-litigation of the issue in the state court. *See, e.g., Delta Airlines, Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582, 587 (11th Cir. 1983); *Johnson v. Radford*, 449 F.2d 115 (5th Cir. 1971); *Southern California Petroleum Corp. v. Harper*, 273 F.2d 715, 719 (5th Cir. 1960). However, the federal court's discretion must be exercised prior to any determination of the preclusive effect of the prior federal judgment by the state court. Once the state court has acted, the Full Faith and Credit Act, 28 U.S.C. § 1738, prevents the federal court from issuing an injunction to nullify the state court's determination, and any federal remedy is waived. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986).

As will be demonstrated below, the injunction issued by the Southern District of Texas in this case was to prevent the relitigation in state court of an issue finally determined by a federal court and constituted a valid exercise of the power of a federal court under the relitigation exception of the Anti-Injunction Act.

The Fifth Circuit defined the scope of a maritime *forum non conveniens* dismissal in *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir. 1983). In *Vaz Borralho*, the Fifth

2. *See Scott v. Hunt Oil Co.*, 398 F.2d 810 (5th Cir. 1968) (upholding a federal district court's imprisonment for contempt of a previously unsuccessful federal litigant for relitigating the same cause of action in state court).

Circuit, faced with a pleading containing theories quite similar to those advanced by Petitioners in the original federal complaint, explained the effect of a federal *forum non conveniens* dismissal:

> Because the appellants asserted claims under American law only, once the district court determined that American law did not apply, "it could have properly dismissed the case pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, and, if deposition and affidavits were considered [as they were in this case] have granted a summary judgment under Rule 56." *Chiazor,* 648 F.2d at 1028 n.7. *See also, Serrano v. Empresa Lineas Maritimas Argentinas,* 257 F.Supp. 870, 872 (D.C. Md. 1966); Comment: *A New Look at Lauritzen v. Larsen, Choice of Law in Forum Non Conveniens,* 38 La.L.Rev. 957, 968-969 (1978). The district court, however, proceeded to dismiss the case under the doctrine of *forum non conveniens.*

696 F.2d at 390-91. The Court noted in a footnote:

> As in *Chiazor,* appellants here do not contend that the district court should have retained jurisdiction if Brazilian law applied. Their sole argument here and in the lower court was the dismissal for *forum non conveniens* was inappropriate if American law applied. *Chiazor,* 648 F.2d at 1020 n.8.

696 F.2d at 391 n.10.

Summary judgment could have been granted to the entirety of this case under the analysis employed by the Fifth Circuit since only American law issues were asserted in the original action. JA 3-7. Such a judgment would have had an obvious *res judicata* effect on any subsequent

attempt to litigate the claim. However, the case was dismissed without prejudice under the *forum non conveniens* doctrine so that the Petitioner's foreign law claims were preserved. This "carving-out" of a narrow exception to the *res judicata* effect of the federal court's judgment was intended to benefit Petitioner and allow her another attempt to litigate her claim in the proper foreign forum. However, the benevolence of the federal court has been subverted by the Petitioner's initiation of the state court proceedings. There can be no doubt that the controversy was fully adjudicated under the meaning of 28 U.S.C. § 2283, as far as the laws of the United States are concerned, regardless of what the dismissal is called.

Under the uniformity doctrine of our maritime law, the Texas courts are required to apply the same maritime standard as was applied by the federal court. The claims asserted in the two courts are the same and the parties are identical.[3] Furthermore, none of the objective facts upon which the prior federal *forum non conveniens* dismissal was based have changed. Therefore, the issue before the state court is identical to the issue previously decided by the federal court's final judgment. Under normal preclusionary rules, the prior federal judgment prevents a

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3. The repleading of the same cause of action is apparent from a review of the original federal complaint and the state court petition. Compare JA at 3-5 with JA at 37-43. The Fifth Circuit recognized that the cause of action asserted in both the state and federal actions were "identical." See the opinion below, 817 F.2d at 309. Petitioners are incorrect in their assertion that the two pleadings do not constitute the same cause of action. The additional theories pled in the state court pleading do not create a new cause of action. Any theories which Petitioners failed to raise during the course of the original proceeding were waived and have merged into that judgment. *See, e.g., Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948).

reconsideration of the *forum non conveniens* dismissal by the state court. *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3rd Cir. 1977). This in itself would be sufficient to support the injunction entered below. However, substantial uncertainty exists as to whether the courts of the State of Texas would consider themselves bound by the prior federal judgment. In such a circumstance, an exercise of the powers granted to federal courts under the relitigation exception was not only appropriate,[4] but necessary to "protect and effectuate" the prior federal judgment and to prevent possible interference by a state with a well articulated policy of our maritime law.

II. State Courts are bound to apply the federal maritime rule of *forum non conveniens* to maritime cases involving claims for injury or death to non-resident aliens.

In 1986, the United States District Court for the Southern District of Texas enjoined the Petitioner from prosecuting claims for the death of her husband in the courts of the State of Texas or any of the states of the United States in order to protect and effectuate its prior judgment. That judgment, entered in 1980, held that the law of the Republic of Singapore controlled Petitioner's substantive rights, dismissed the Petitioner's claims under the maritime law of the United States, and, finally, dismissed what remained of the action under the maritime doctrine of *forum non conveniens* for further proceedings

4. Petitioners have not claimed in this Court that other requisite factors necessary for an injunction (i.e. irreparable harm or lack of an adequate remedy at law) are lacking. Petitioners have only argued that the injunction is barred by the Anti-Injunction Act.

in Singapore.[5] (JA at 34-35) Although in the state court, Petitioner asserted claims under the Jones Act and the maritime law of the United States generally (JA at 37-44), the Petitioner has indicated that these claims have in effect been withdrawn and her state court claims arise entirely under the laws of the State of Texas and the Republic of Singapore. (Petitioner's Brief, p.4, n.5).[6] The claim asserted nevertheless remains a maritime claim since it involves the death of a maritime worker on navigable water.

At issue here is whether the prosecution of the Petitioner's state court claim can be enjoined by a federal court pursuant to the relitigation exception of the Anti-Injunction Act. The validity of the injunction must turn on the preclusive effect of the prior judgment, and, in particular, the preclusive effect on a state court of a federal *forum non conveniens* dismissal of a maritime death claim controlled by the law of Singapore. This question raises significant issues regarding the nature and content of the doctrine of *forum non conveniens* applicable to maritime personal injury and death claims involving foreign maritime workers and the relationship that must exist between our state and federal courts in dealing with such claims under the Uniformity Doctrine of our maritime law.

5. The 1980 Judgment dismissed claims under the Jones Act, 46 U.S.C. § 688; the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*; the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*; and the general maritime law of the United States. A claim under the Texas Wrongful Death Statute was also dismissed. JA 34-36.

6. This admission concedes the propriety of an injunction prohibiting the relitigation of the dismissal of the federal claims.

A. The *forum non conveniens* rule under consideration constitutes a substantive maritime rule of decision.

In recent years, a large number of claims have been asserted in American courts by foreign maritime workers or their dependents for personal injuries and deaths occurring in the territorial or adjacent waters of nations other than the United States. By far the greater proportion of these claims appear to have involved alien offshore oil workers injured or killed in waters adjacent to a foreign nation while employed, directly or indirectly, by American corporations. *E.g., McClelland Engineers, Inc. v. Munusamy*, 784 F.2d 1313 (5th Cir. 1986); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir. 1983).[7] A smaller number of these claims appear to have involved more traditional maritime workers injured aboard ships at the time located either on the high seas or in the territorial waters of a foreign nation. *E.g., Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959). This case falls into the latter category.

In response to cases of this nature, our federal courts have developed the *forum non conveniens* rule under consideration to guide them in the determination of whether a particular claim should be resolved under American law in an American court or under the law and in the courts of a sovereign nation with a more predominant interest in the resolution of the claim than the United States. While the development of this maritime *forum non conveniens* doctrine has taken place

7. These types of cases are now specifically excluded from Jones Act and U.S. maritime law coverage under 46 U.S.C. § 688(b).

on a national basis,[8] the development that has taken place in the Fifth Circuit is most relevant to the case at hand.[9] The leading cases in the Fifth Circuit which articulate the *forum non conveniens* approach taken by the federal district court are *Vaz Borralho v. Keydril Co., supra*, 696 F.2d at 384 and *Chiazor v. Transworld*

8. During the thirty-four years between *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft v. Reyno*, 454 U.S. 235, 240 (1981), the Federal Circuit courts produced a substantial body of case law regarding *forum non conveniens* in the maritime context. *See, e.g., Villar v. Crowley Maritime Corp.*, 782 F.2d 1478 (9th Cir. 1986); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Szumlicz v. Norwegian America Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983); *DeMateos v. Texaco, Inc.*, 562 F.2d 895 (3rd Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (all following the basic rule as announced in *Vaz Borralho, supra*, by the Fifth Circuit); *compare Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983).

9. The *forum non conveniens* law of the Fifth Circuit is quite well developed. The Fifth Circuit approach, as embodied within the original federal dismissal, mandated a choice of law determination employing the *Lauritzen/Rhoditis/Romero* factors. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen v. Larsen*, 345 U.S. 571 (1953). If American law applied, then the district court could not dismiss on *forum non conveniens* grounds. If American law did not apply, the court would then look to convenience factors.

This approach finds its seminal Fifth Circuit case in *Fisher v. Agios Nicholos V*, 628 F.2d 308 (5th Cir. 1980), *cert. denied sub nom., Valmas Bros. Shipping, S.A. v. Fisher*, 454 U.S. 816 (1981). Subsequent Fifth Circuit opinions addressed the scope and function of a conditional *forum non conveniens* dismissal, *DeOliveira v. Delta Marine Drilling Co.*, 707 F.2d 843 (5th Cir. 1983); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir. 1983); *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982), and the finality of a *forum non conveniens* dismissal for purposes of appeal, *Koke v. Phillips Petroleum Co.*, 730 F.2d 211 (5th Cir. 1984). Recently, the Fifth Circuit liberalized its *forum non conveniens* approach to enable a federal district court to dismiss a claim on *forum non conveniens* grounds, notwithstanding the applicability of American law. *Gonzalez v. Naviera Neptuno, A.A.*, 832 F.2d 876 (5th Cir. 1987).

Drilling Co., 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982). *Chiazor* explains the analysis followed by the federal district court in the case at bar:

> . . . prior to dismissing a case for *forum non conveniens*, a district court should ascertain if American or foreign law is applicable. If American law is applicable, then the American court should retain jurisdiction. [Citing many cases] Only when it is determined that foreign law applies is it appropriate to consider the *forum non conveniens* factors listed in *Gilbert Oil Corporaton* [sic] in determining whether to retain jurisdiction acquired over a maritime suit with foreign factors.

648 F.2d at 1017-18.[10] Under this analysis, the applicable law is to be determined using the factors presented in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970). Likewise, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), places particular focus upon the contacts of the claim with the foreign forum and the injustice inherent in the retention of jurisdiction in an American court. This approach places little reliance on factors related solely to convenience, and places substantial emphasis on the contacts between the claim and a specific foreign forum.[11]

10. *See also McClelland Engineers Inc. v. Munusamy*, 784 F.2d 1313, 1316-17 (5th Cir. 1986).

11. In approving of the *forum non conveniens* dismissal in *Chiazor*, the Court of Appeals stated:

> We agree with the district court's dismissal for *forum non conveniens* [footnote omitted], for the balance is strongly in favor of the defendants and an injustice would follow had the district court retained jurisdiction. Here the district court would have had to apply (1) Nigerian law to a case (2) initiated by Nigerian plaintiffs (3) for the death of a Nigerian oil worker (4) injured off the Coast of Nigeria, (5) who received medical care in Nigeria, (6) with most of the witnesses located in Nigeria.

648 F.2d at 1020.

The maritime *forum non conveniens* rule exemplified by *Chiazor* and *Vaz Borralho*, as applied in the original federal proceeding, is a hybrid.[12] The rule is based both on this Court's decisions regarding choice of law in the maritime personal injury context, namely *Lauritzen*, *Rhoditis* and *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), and the adaptation of the traditional maritime and equitable notions of *forum non conveniens* to our general civil law by this Court in *Gulf Oil Corp. v. Gilbert, supra*. In *Lauritzen v. Larsen, supra*, this Court confronted the issue of whether the maritime law of this nation or the law of some other

12. The primary consideration of the maritime *forum non conveniens* analysis employed by the district court in the original federal proceeding was choice of law. This approach has been recently modified by the Fifth Circuit. *See Gonzales v. Naviera Neptuno A. A.*, 832 F.2d 876 (5th Cir. 1987) (following *In Re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987) (en banc), and this Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)). Although these decisions have modified the approach employed in the Fifth Circuit to maritime *forum non conveniens* to some extent, in that choice of law determinations are no longer an exclusive factor, choice of law and the balancing of national interests, remain important considerations. *Gonzales*, 832 F.2d at 879 (choice of law); *Piper*, 454 U.S. at 260, 261 (national interests). Thus, while the method of analysis to be employed in federal *forum non conveniens* cases has changed somewhat, the fundamental factors that must be considered remain the same.

Regardless of these recent developments, the dismissal of the original federal complaint became binding when petitioners failed to perfect a timely appeal. *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (5th Cir. 1983), *cert. denied*, 464 U.S. 826 (1983) (*Choo I*). The federal determinations regarding convenience and choice of law cannot be altered by repleading in state court or argument of counsel in this Court.

nation should control the claim of a foreign seaman for personal injuries under the Jones Act, 46 U.S.C. § 688. In holding that the choice of law criteria to be applied in such a situation are to be arrived at "from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority," 345 U.S. at 582, this Court referred back to "a seasoned body of maritime law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations," 345 U.S. at 577.[13] Similarly, in *Romero v. International Terminal Operating Co., supra,* which held, *inter alia,* that the choice of law factors set out in *Lauritzen* apply equally to claims asserted under the general maritime law of

13. Elaborating on this notion, this Court went on to observe:

> . . . the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. [Footnote omitted.] It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign power by any nation, but from common consent of civilized communities of rules designed to foster amicable and workable commercial relations.
>
> International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making or altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which consideration of comity, reciprocal and long range interest have developed to define the domain which each nation will claim as its own.

345 U.S. at 581-82.

the United States, this Court observed that it "must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community. . . . The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled with the conduct of our foreign relations." 258 U.S. at 382-83.

In *Gulf Oil Corp. v. Gilbert, supra,* this Court held that federal courts have the inherent power to dismiss a suit arising under the diversity jurisdiction pursuant to the doctrine of *forum non conveniens.* Both Justice Jackson, writing for the majority, and Justice Black in dissent, acknowledged as a basis of the *Gulf* holding the recognized power of our admiralty courts to decline jurisdiction on the ground that the litigation is between foreigners and "can be more appropriately conducted by a foreign tribunal." 330 U.S. at 504 and 513. In establishing criteria for the exercise of the power of federal courts to decline jurisdiction in diversity cases, this Court focused on factors of private and public interest that would make trial in one court in the United States more appropriate and convenient than trial in another court. The focus of *Gulf v. Gilbert* certainly was not on "the reasons peculiar to the special problems of admiralty."[14] Nevertheless, *Gulf v. Gilbert* is cited generally as the modern source of the doctrine of *forum non*

14. 330 U.S. at 513-14 (Black, J., dissenting) (citing *Canada Malting Co. v. Paterson Steamships,* 285 U.S. 413 (1932)).

conveniens both in the diversity and maritime context. Viewed from the context of the admiralty law, *Gulf v. Gilbert* takes a concept long held necessary to the administration of the admiralty law—that admiralty, as a branch of international law, must be concerned with the accommodation and reconciliation of competing national interests—and extends it into a purely domestic American context. *See generally* Bickel, *The Doctrine of Forum Non Conveniens Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L. Q. 315 (1943). Maritime *forum non convenens* existed prior to *Gulf v. Gilbert*, and it exists after *Gulf v. Gilbert*, even though it is now articulated, at least partially, in terms of the *Gulf v. Gilbert* factors.

The maritime *forum non conveniens* doctrine exemplified in the Fifth Circuit by *Chiazor* and *Vaz Borralho* and now *Gonzalez v. Naviera Neptuno, supra*, is not simply the application of the *Gilbert* convenience factors to maritime cases. As has been indicated, the maritime doctrine focuses primarily on the relative interests of the United States and other nations in the resolution of a maritime tort claim. It is concerned with the propriety of litigating a maritime tort claim of a foreign maritime worker in the courts of the United States, which is controlled by the maritime law of a country other than the United States. It does not look primarily to the convenience of the parties or the trial court, but to the appropriateness of resolving a particular maritime tort claim in the United States under the principles of accommodation and comity recognized in the intenational context by our general maritime law. The doctrine is really a rule of international abstention, preventing undue interference by our courts in the administration of the maritime law of another country when the interests of that country in the resolution of a specific maritime personal injury claim predominate over the interests of the United States.[15]

Viewed in this light, the doctrine of *forum non conveniens* that has developed regarding foreign maritime injury and death claims must be considered a substantive rule of decision under our general maritime law, distinct from the doctrine of *forum non conveniens* that is applied in cases involving disputes wholly indigenous to this country.[16] The difference is demonstrated by a consideration of the specific problem to which each rule is directed. In the context of an indigenous dispute, the problem is to determine which of two or more available forums in the United States is the most appropriate court to try the case. The problem confronted in the area of international maritime tort is to determine whether it would be appropriate to adjudicate the case in *any* court in the United States given the predominantly foreign

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15. An analogy may easily be drawn to federal abstention under grounds of comity. *See generally Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

16. With the codification of domestic *forum non conveniens* on the federal level as a venue transfer device, 28 U.S.C. § 1404(a), it can be said that federal *forum non conveniens*, even in the diversity context, deals with the appropriateness of adjudication in the United States when a more convenient foreign forum may be available. *See In re Air Crash, supra*, 821 F.2d at 1159-60, n.15. A federal *forum non conveniens* dismissal has no efficacy if it has no preclusive effect on subsequent litigation in the United States, regardless of whether it is employed in a diversity case or a maritime case. Regardless of the source of the federal jurisdiction, policy considerations underlying both the *Erie* Doctrine (for diversity cases) and the Uniformity Doctrine (in maritime cases) and other factors may require that the *res judicata* effects of the application of the federal *forum non conveniens* rule to cases arising under state law be treated apart from maritime cases. Accordingly, Respondent directs its arguments to the considerations applicable to the rule in an admiralty context.

nature of the claim presented. One is a rule of convenience and judicial economy; the other is a rule of international accommodation and comity. Different policy considerations must underlie the application of each rule and a different *res judicata* effect must be given to decisions made under each rule. In the application of the indigenous rule, it is enough for a court to decide that it is not the appropriate court to consider the case, and leave other American courts free to determine for themselves whether they would be an appropriate forum. In the application of the international rule, however, such a practice is impossible. If, after one American court has determined that it would not be appropriate to adjudicate a claim in the United States, a second American court agrees to accept the case, the determination of the first court is completely nullified.[17] Thus, if the possibility of inconsistent results in multiple American courts is to be avoided, the international rule must be treated as one going to the substance of the adjudicative process and must preclude any reconsideration of its application, once that application has become final.[18]

17. Petitioner makes much out of the fact that a *forum non conveniens* dismissal by its nature lacks finality in that it necessarily contemplates further proceedings in another court. However, a *forum non conveniens* dismissal which contemplates further proceedings outside of the United States is a final judgment as far as the courts of this country are concerned. *Koke v. Phillips Petroleum Co.*, 730 F.2d 211, 218 (1984) (holding a *forum non conveniens* dismissal a final judgment under 28 U.S.C. § 1291). A maritime *forum non conveniens* dismissal is considered as a final judgment by the Fifth Circuit similar to a dismissal under Rule 12(b)(6) or Rule 56 of the Federal Rules of Civil Procedure. *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 385 (5th Cir. 1983).

18. Cases of this Court in which the *forum non conveniens* dismissal were not given preclusive effect concern purely domestic situations. *See, e.g., Parsons v. Chesapeake & O. Ry. Co.*, 375 U.S. 71 (1963); *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950).

B. A state court is required to apply the maritime *forum non conveniens* rule under the uniformity doctrine.

As was said by the Court below: "Within its sphere of operation, the maritime law of the United States is supreme; and the states are without power to disrupt it." 817 F.2d at 316. This doctrine of uniformity was firmly established in the early part of this century beginning with *Southern Pacific Co. v. Jensen*, 224 U.S. 205 (1917), where this Court held that no state "legislation is valid if it contravenes the essential purpose expressed by an Act of Congress, or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." In *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372 (1918), the notions of uniformity and supremacy contained in *Jensen* were extended to prevent the application of a state common law standard of liability in a maritime personal injury case in contravention of the established maritime standard. In *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), this Court fashioned a maritime standard to cover injuries to ship visitors without reference to existing state common law rules. In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), this Court indicated that both the substantive and procedural features of a maritime tort are controlled by federal maritime law, citing *Panama Railroad v. Johnson*, 264 U.S. 375, 376 (1924), and that federal maritime law would be controlling, even if the Petitioner were seeking to enforce a state created remedy. In similar vein, this court in *Garrett v. Moore-McCormick Co.*, 317 U.S. 239 (1942), held that the federal burden of

proof rule regarding contested seamen's releases for personal injury must be applied by a state court over the state's own conflicting rule. In so doing, this Court stated:

> If by its practice the state court were permitted substantially to alter the rights of either litigant, as these rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates.

317 U.S. at 245. Most recently, this Court has reaffirmed the essential requirement of uniformity in maritime law in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), by holding that neither the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.*, nor the Death on the High Seas Act, 46 U.S.C. § 761, *et seq.*, requires or permits the application of the Louisiana Wrongful Death Statute in a maritime death case. In discussing whether even Congress could constitutionally allow the application of state statutory remedies to maritime injuries, Justice O'Connor, writing for the majority, noted the Court long ago had ruled that "Congress could not delegate to the state the ability to proscribe rules governing maritime injuries 'that would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established.'" 477 U.S. at _____, 106 S. Ct. at 2498 (quoting *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920)). The opinion went on to hold that while state courts have

in personam jurisdiction over certain maritime actions pursuant to the "saving to suitors" clause of the Judiciary Act of 1789 (now codified at 28 U.S.C. § 1333), they are constrained to apply federal maritime law:

> The "savings to suitors" clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse Erie" doctrine which requires the substantive remedies afforded by the States to conform to governing federal maritime standards.

477 U.S. at _____, 106 S. Ct. at 2495.

In this case, we face the question of whether the uniformity doctrine requires a state policy of maintaining its courts open to all litigants to give way to a conflicting federal policy of limiting the access of claimants to our maritime courts depending on the nexus of their claim with this country. While it is unclear whether the Texas Supreme Court would interpret the Texas Open Forum Statute as being mandatory rather than permissive in nature, there is more than a reasonable possibility that Texas would be of the view that its Open Forum Statute, § 71.081, Tex. Civ. Prac. & Rem. Code (Vernon 1986), mandates the acceptance of jurisdiction over any personal injury or death claim, regardless of its contact (or lack of contact) with the State of Texas. *See Couch v. Chevron International Co.*, 682 S.W.2d 534 (Tex. 1984).[19] Thus,

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19. Relying on this Court's decision in *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), Petitioner argues that as a result of the injunction entered in this case, the State of Texas has been prevented from determining the scope of its own *forum non conveniens* doctrine and accommodating any possible federal interests at issue. This argument misapprehends the issue actually raised in this case. The questions before the Court

this case presents the question of whether the maritime law's well established policy of self restraint in dealing with foreign tort claims is to prevail over conflicting policies followed by several states.[20]

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are whether a state court is required to apply the same maritime *forum non conveniens* standard as did the federal court so that the prior federal court application of that standard to the facts of this case is *res judicata* to the state court. The question is not, as Petitioner would apparently have it, whether the federal standard is sufficiently similar to the Texas standard (if one exists) to prevent the Texas court from considering as a matter of state law the appropriateness of declining to exercise its concurrent maritime jurisdiction under the savings clause. In actuality, the application of a state's *forum non conveniens* or open forum rule is a question entirely separate and distinct from the application of the maritime *forum non conveniens* rule. The state is required under the uniformity doctrine to *first* apply the maritime rule, even if it has a well developed *forum non conveniens* rule that would achieve substantially the same result as the maritime rule. For instance, it would be entirely consistent for a state court to first apply a federal standard and determine that a maritime claim could be appropriately resolved in the United States and then apply the state standard based on considerations of convenience and decline the case because it could be more conveniently tried in another American forum. Similarly, in a jurisdiction such as Texas, the state court could conclude that under the federal standard the case was appropriate for American adjudication and then conclude that under the state's open forum statute it was required to accept the case even though a more convenient forum existed in the United States. This is not unlike the analysis applicable to a state's "long arm" jurisdiction statute of first determining whether the statute is broad enough to impose *in personam* jurisdiction under the facts of the case and then considering whether such an imposition of jurisdiction would offend the requirements of due process under the Constitution. *Compare World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) *with Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

20. Clearly, Texas is not alone in attempting to hold its courts open to the tort claimants of the world as witnessed by the policy of Texas' sister state Louisiana as evidenced in *Kassapas v. Arkon Shipping Agency, supra*. Florida also fails to recognize *forum non conveniens* when one of the parties is a resident of Florida. *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985).

This conflict between our state and federal systems regarding international maritime claims does not exist in isolation. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964),[21] this Court held that the federal "act of state" doctrine must apply to the states. As was noted by the court below, the act of state doctrine is not dissimilar to the doctrine of *forum non conveniens. See* R. Falk, *The Role of Domestic Courts in the International Legal Order* 9 (1964). In the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, Congress has asserted the supremacy of federal law in disputes between citizens of this country and the commercial enterprises carried out by foreign governments. Perhaps even more telling, Congress has amended § 688 of the Jones Act so as to exclude non-resident alien offshore oil workers from the protections afforded under American law, unless no appropriate forum is available to them. 46 U.S.C. § 688(b). Likewise, there are constitutional due process concerns that impinge on a state's ability to adjudicate claims that have little or no connection with the United States. For example, only last year, this Court, in *Asahi Metal Industry v. Superior Court of California*, ____U.S.____, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987), held that due process requirements prevented California from exercising personal jurisdiction over a Taiwanese component manufacturer in a products liability case involving automobile tires manufactured in Japan.[22]

In this context, the court below faced the issue of whether a state court was bound to apply the federal

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21. *See also Zschernig v. Miller*, 389 U.S. 429, 436 (1968).

22. Another consideration is the due process prohibition against an extension of state law over foreign claims in which the state has no substantial interest. *See generally Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

maritime *forum non conveniens* doctrine in a maritime injury or death case brought pursuant to the "savings to suitors" clause. The court considered four general factors to aid in the analysis necessary to determine if specific aspects of state law are *preempted*[23] by federal maritime law: (1) state law is not preempted when it contains a detailed scheme to fill a gap in maritime law; (2) state law is not preempted when the law regulates behavior in which the state has an especially strong interest; (3) maritime law preempts state law whenever a uniform rule will facilitate maritime commerce; and (4) maritime law preempts state law when the state law impinges on transnational or international relations. Applying these factors, it is clear, as the court below held, that the maritime doctrine must be followed by the states and that any state's open forum policy must yield. First, the maritime *forum non conveniens* doctrine is well developed and leaves no "gaps" to be filled by state law. Second, the interest

23. Apparently relying on the use of the term "preempted" by the court below, Petitioner invokes decisions from this Court, such as *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511 (1955), to argue that the injunction here at issue was somehow based solely on the notion that because federal law had preempted the state law in the maritime area, a state court could not entertain the case. This position seeks to ignore the real issue in this case, which is whether the prior federal dismissal worked an estoppel by judgment preventing reconsideration of the issue by the state court. The essential ingredient under the relitigation exception is a prior judgment of sufficient preclusive effect to prevent a reconsideration of the issues decided by a second court. For the prior judgment to have such preclusive effect, the case upon which it is predicated must be binding on the second court. Thus, the decision below quite properly considered whether maritime *forum non conveniens* law "preempted" state law so that the Texas court was bound to follow federal law on the point. There is no suggestion in the opinion below that a federal court is empowered to enjoin a state court's exercise of its concurrent maritime jurisdiction simply because federal maritime law has "preempted" state law.

of a state "in the substance of claims by non resident aliens arising from activities in foreign lands cannot be considered strong." 817 F.2d at 320. The third and fourth factors, however, predominate. As was observed below: "the need for uniform application of the doctrine by all courts in the United States is particularly acute because of the transnational and international nature of the interests at stake in a *forum non conveniens* inquiry." 817 F.2d at 310. Further, "Federal law controls the international role of all courts in the United States." 817 F.2d at 321. On this basis, the court below reached the inescapable conclusion that "state court *must* apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which federal courts would have admiralty jurisdiction." 817 F.2d at 324 (emphasis in original).

Since in this case the state is required to apply the identical legal standard to the same objective facts as was applied by the federal court in dismissing the case for further proceedings in the Republic of Singapore, the prior federal ruling has the effect of precluding the relitigation of the same issue by the state court. 817 F.2d at 324-25. The relitigation exception to the Anti-Injunction Act empowers the federal court to enjoin further state proceedings "to protect or effectuate its judgment."[24]

The correctness of Judge Gee's analysis below becomes even more apparent from a practical consideration of the various competing interests that must be accommodated by our maritime law in both the international and federal context. Maritime law is fundamentally a body of international law governing water-borne commerce between

24. *See* notes 3-5, *infra*, and accompanying text.

sovereign nations. While the admiralty and maritime jurisdiction must of necessity be plenary, it must be exercised with great sensitivity to the competing national interests with which it must deal.[25] In response, our maritime courts must be free to develop specific rules of judicial restraint, such as the *forum non conveniens* rule here at issue, as part of the mutual accommodation that must exist among maritime nations so that water-borne commercial activities can be conducted in an environment of reasonable expectations and predictability. As we in the United States expect that injuries sustained by American seamen serving aboard American ships will be dealt with in our courts according to American maritime law, (regardless of the place of the injury) and that injuries sustained by American harbor workers in American ports will be dealt with in similar fashion (regardless of the nationality of the ship upon which the injury occurs), we must always be cognizant that similar expectations are entertained by other nations with regard to their maritime workers. These expectations are not simply based on attitudes of nationalism, but also find a basis in the need for orderly administration of international maritime law. To ignore such expectations would introduce a degree of uncertainty and unpredictability into the maritime law which would be disruptive to the conduct of the commercial activities involved and, ultimately, disruptive of the ordered relations that must exist among nations. As the court below held, 817 F.2d at 321-26, and as this Court has many times pointed out,[26] the intenational role

25. *E.g., Jackson v. Steamboat Magnolia,* 61 U.S. (20 How.) 296, 298, 300-01 (1857).

26. *E.g., Zschernig v. Miller,* 389 U.S. 429, 436 (1968).

of our courts is a federal interest to be controlled by federal law.

But at the same time our system of maritime law must fit within our federal system, particularly in view of the fact that from the earliest days of our Republic, Congress has allowed the States to exercise concurrent jurisdiction in the maritime arena pursuant to the "savings to suitors" clause.[27] Thus, our system of maritime law must attempt to balance the competing state and federal interests, as well as the competing international interests. Obviously, if the states, in their exercise of concurrent jurisdiction over matters maritime, are able to ignore the accommodations reached on the federal level in the interest of international comity, the federal accommodations can be effectively nullified. To the extent that our maritime law pertains to issues of a transnational or international nature, the courts of the United States must speak with one national voice and the states' interest in administering their separate judicial systems must yield to the dominant interest of the federal government in this specialized international arena. Thus, it can be seen that a rule of judicial self-restraint, empowering our maritime courts to decline to exercise their jurisdiction in maritime cases having predominant contacts with a nation other than the United States, is fundamentally different from a rule allowing our courts to refrain from exercising their jurisdiction on the basis of factors of convenience and judicial economy in controversies where the contacts are exclusively American. This fundamental difference must be recognized, even if the two rules are articulated in similar fashion or have developed from similar sources.

27. 28 U.S.C. § 1333; *E.g., The Moses Taylor,* 71 U.S. (4 Wall.) 411 (1866). However, "[i]t is not a remedy in the common law courts which is saved, but a common law remedy." *Id.* at 431.

In this light, the categorical distinction between "substantive" and "procedural", that has proved useful in other circumstances, hinders the analytical process leading to a proper resolution of the issue presently before the Court. For the purposes of this case, it really makes no difference whether *forum non conveniens* can be denominated as "substantive" or "procedural" or whether a state recognizes a *forum non conveniens* concept in its domestic jurisprudence. The point is that our federal maritime jurisdiction recognizes and employs such a concept in its effort to accommodate our maritime law to the maritime legal systems of other nations. If that accommodation is to be effective, state courts hearing maritime cases under the savings clause cannot be allowed to interfere with the efforts of the federal courts in this regard or ignore the rules of decision employed by the maritime law to balance competing national concerns. A maritime case in which foreign concerns are dominant must be treated the same in state court as it would in federal court. At this point the uniformity doctrine must prevail.

III. The injunction below was appropriate because the *forum non conveniens* dismissal by the federal court is binding on the state court.

A state court entertaining a maritime tort claim in which non-American contacts are paramount is obliged to follow the maritime rule of *forum non conveniens* under the uniformity doctrine. It follows that a state court in such a circumstance would be bound under traditional rules of *res judicata* by a prior federal determination that the case should be dismissed for adjudication in

a foreign forum since the same rule would be applied. To allow any other course would constitute an abdictation of the overriding federal role in the administration of our maritime law and would lead to a totally unacceptable inconsistency in its application. Foreign tort claimants, having been turned away by one court, would literally be free to *shop* for another court willing to afford them a trial in this country. If such claimants are precluded from searching for a more hospitable federal court after having been told by one federal court to resolve the claim in a foreign forum, they also should be precluded from seeking the hospitality of the courts of an open forum state.

The approach taken by the Third Circuit in *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3rd Cir. 1977), is most appropriate. There it was held that a second federal court was precluded from relitigating a prior federal maritime *forum non conveniens* dismissal on the basis of direct estoppel by judgment. The case concerned a ship collision between two non U.S. flagged vessels off the coast of England. The original action filed in federal district court in New York was dismissed *forum non conveniens* on the ground that England was the proper forum. This dismissal was affirmed by the Second Circuit in *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976). Subsequently, actions identical to those filed in New York were filed in the federal district court for Delaware. The Delaware court dismissed on the ground that prior dismissal was *res judicata*. On appeal, the Third Circuit affirmed, stating:

> In this case the appellants point to identical objective criteria and rely on identical material facts under-

> lying the application of those criteria. Their contention amounts to no more than a wish that, in applying the objective criteria to the undisputed facts, a different judge would make the discretionary *forum non conveniens* determination [differently]. If the appellants expected the district judge in Delaware to exercise a more discrete determination than his judicial brother in the Southern District of New York, then they should have begun their litigation in Delaware. Having now finally lost in New York, they cannot relitigate the same factual and legal issues in Delaware.

565 F.2d at 854.

This Court's decisions in *Missouri ex rel. Southern Railway v. Mayfield*, 340 U.S. 1 (1950),[28] and *Parsons v. Chesapeake & Ohio Railway*, 375 U.S. 71 (1963),[29] both deal with the concept of *forum non conveniens* as it

28. *Missouri v. Mayfield* holds that the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, does not mandate by its own terms a state's abandonment of the doctrine of *forum non conveniens*. This opinion is completely distinguishable from the case presently before the Court, since no American law, including the Jones Act (which is based upon the FELA), applied to the original federal claims as a matter of law.

29. *Parsons* presented this Court with a situation the reverse of *Chick Kam Choo*. In a *per curiam* opinion, the Court framed the issue:

> The question presented by this case is whether a federal district judge in an action brought under the Federal Employers' Liability Act is divested of all discretion to deny a Section 1404(a) transfer motion, when a suit upon the same cause of action, earlier brought in a state court in the same city, was dismissed by the state court on the grounds of *forum non conveniens*.

375 U.S. at 71. The *Parsons* Court held, as a matter of statutory construction, that the exercise of the discretionary power vested by Congress in the federal courts pursuant to 28 U.S.C. § 1404(a) to transfer the venue of cases could not be precluded by state *forum non conveniens* law. As with *Missouri v. Mayfield*, *supra*, *Parsons* was a FELA case.

applies to claims indigenous to this country and therefore are inapposite to the issue presently before the Court. When a court declines to exercise its jurisdiction in a purely domestic case relying on the convenience factors of *Gulf Oil Corp. v. Gilbert*, *supra*, or transfers the case under § 1404 of Title 28, it necessarily intends that the matter will be finally adjudicated in another American court. It serves no useful purpose to invest such a *forum non conveniens* determination with the same preclusive effect as is necessary to give substance to the *forum non conveniens* rule applicable to cases in which foreign contacts predominate. Yet the Petitioner argues that in both cases the preclusive effect should be the same and that neither should impede a second court's consideration of the case. Such an approach renders any judicial effort to determine the appropriate forum for a foreign maritime claim a meaningless academic exercise. Perhaps even more troubling is the argument's implicit frontal assault on the constitutionally dictated doctrine of uniformity in the application of the general maritime law of this country on the transnational and international level. Petitioner argues that once all federal maritime claims are dismissed, there is no longer any federal jurisdiction to be protected (Petitioner's Brief 14, n.9, *see also* JA at 96-98), presumably allowing a state court to provide state statutory and common law remedies unimpeded by the prior federal judgment.[30] This introduces the possibility of two[31] separate and independent

30. For instance, Petitioner is unclear whether the choice of law determination in the dismissal of this action by the federal court would be binding on the state court or if a second choice of law determination would be required under Sec. 71.031(c) of *Tex. Civ. Prac. & Rem. Code* (Vernon 1986).

31. Given the fact there are fifty states, at least fifty-one separate bodies of law are potentially involved.

bodies of law to govern our international maritime affairs and the possibility that different results can be obtained in the same underlying controversy by applying to either a federal or state court.[32] This possibility transcends simple notions of issue preclusion and becomes in fact an attack on the admiralty and maritime jurisdiction of the United States as it is presently understood.

The 1980 dismissal of this action by the federal court in Houston for adjudication according to the laws and in the courts of Singapore precludes the Texas state court from entertaining this action and therefore supports the permanent injunction prohibiting the further prosecution of this matter in any court in the United States under the relitigation exception of the Anti-Injunction Act.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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32. *E.g., compare Kassapas v. Arkon Shipping Agency*, 485 So. 2d 565 (La. App.), *writ denied*, 488 So. 2d 203 (La.), *cert. denied*, ____U.S.____, 107 S. Ct. 422 (1986) *with Kassapas v. Arkon Shipping Agency*, 578 F. Supp. 400 (S.D.N.Y.), *aff'd mem.*, 738 F.2d 418 (2d Cir. 1984).

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Brief of Respondents upon Benton Musslewhite, Esq., 609 Fannin Street, Suite 517, Houston, Texas 77002, the counsel of record for the Petitioners herein, by placing the same in the United States Certified Mail, Return Receipt Requested, in a properly addressed package with adequate postage thereon.

This _____ day of February, 1988.

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JAMES PATRICK COONEY